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No.

In the
Supreme Court of the United States

John and Barbara Abela,

Petitioners,

v.

General Motors Corporation, a Delaware Corporation,

Respondents.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

F. Paul Bland, Jr.
Counsel of Record
Michael J. Quirk
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Avenue, NW, Suite 800
Washington, D.C. 20036
(202) 797-8600

Christopher M. Lovasz
Mark Romano
Consumer Legal Services, P.C.
30928 Ford Road
Garden City, Michigan 48135
(734) 261-4700

E. Powell Miller
Miller Shea, P.L.L.C.
1301 W. Long Lake, Suite 135
Troy, Michigan 48098
(248) 267-1200

Counsel for Petitioners

QUESTION PRESENTED

The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312, allows warrantors to include in their written warranties a requirement that consumers submit claims to "informal dispute settlement procedure[s]," 15 U.S.C. § 2310(a)(3), but also preserves a consumer's right to commence a civil action after he or she "initially resorts to such procedure." *Id.* The Federal Trade Commission interprets this statutory provision to make all private dispute resolution procedures related to a written warranty to be non-binding (16 C.F.R. § 703.5(j)), and therefore to prohibit warrantors from enforcing pre-dispute agreements for binding arbitration with respect to claims arisingfrom a written warranty (64 Fed. Reg. 19700, 19708 (1999)).

The question presented is whether the Magnuson-Moss Warranty Act and the Federal Trade Commission's regulations and interpretive guidelines issued pursuant to the Act prohibit warrantors from enforcing pre-dispute binding arbitration clauses against consumers raising claims related to a written warranty.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioners John and Barbara Abela (as appellants) and respondent General Motors Corporation (as appellee).

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OPINIONS BELOW

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JURISDICTION

The decision of the Michigan Supreme Court was filed on April 7, 2004. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The "Remedies in consumer disputes" provision of the Magnuson-Moss Warranty Act of 1975, 15 U.S.C. § 2310, addresses informal dispute resolution and a consumer's right to commence a civil action as follows:

> **(a) Informal dispute settlement procedures; establishment; rules setting forth minimum requirements; effect of compliance by warrantor; review of informal procedures or implementation by Commission; application to existing informal procedures**; (1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The [Federal Trade] Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this title applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If —

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure . . .

. . .

(d) Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims. (1) Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title or under a written warranty, implied warranty, or service contract, may

bring suit for damages and other legal and equitable relief —

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

. . .

The Federal Trade Commission's regulations addressing informal dispute settlement procedures for consumer claims under the Act provide in relevant part as follows:

[16 C.F.R.] § 700.8 Warrantor's decision as final

A warrantor shall not indicate in any written warranty or service contract either directly or indirectly that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract. . . .

[16 C.F.R.] § 703.5 Operation of the Mechanism

. . .

(j) Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall act in good faith, as provided in § 703.2(g) of this part. In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110(a)(3) of the Act.

The Commission's Final Agency Action Interpreting the Act and Regulations, 40 Fed. Reg. 60168, 60210 (1975), provided in relevant part as follows:

> The Rule [of 16 C.F.R. § 703.5] does not allow (binding arbitration) for two reasons. First, . . . Congressional intent was that decisions of section 110 Mechanisms not be legally binding. Second, even if binding Mechanisms were contemplated by section 110 of the Act, the Commission is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit themselves, at the time of product purchase, to resolve any difficulties in a binding, but nonjudicial proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers.

The Commission's Final Agency Action reaffirming this interpretation, 64 Fed. Reg. 19700, 19708 (1999), provides in relevant part as follows:

> The Commission believes that this interpretation continues to be correct. Therefore, the Commission has determined not to amend § 703.5(j) to allow for binding arbitration. Rule 703 will continue to prohibit warrantors from including binding arbitration clauses in their contracts with consumers that would require consumers to submit warranty disputes to binding arbitration.

STATEMENT OF THE CASE

This case presents the question of whether the Magnuson-Moss Warranty Act of 1975, 15 U.S.C. § 2301-2312 (1996) ("MMWA" or "Act"), and regulations and interpretive guidelines issued by the Federal Trade Commission ("FTC") prohibit warrantors from enforcing pre-dispute binding arbitration clauses against consumers raising claims pursuant to a written warranty. The Michigan Supreme Court rejected the FTC's interpretation of the Act and held that the Act permits enforcement of these arbitration clauses. In so holding, the court below disregarded not only the FTC's long-standing interpretation of the Act, but also this Court's teaching that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). The Michigan Supreme Court's decision, which is in direct conflict with the Mississippi Supreme Court's holding in *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002), is the subject of this petition.

A. The Federal Statutory and Regulatory Framework

1. The Magnuson-Moss Warranty Act

The MMWA was enacted to "improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products . . ." 15 U.S.C. § 2302(a). To realize these goals, the Act gives consumers a statutory right of action in federal or state court when they have been "damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation

under this chapter or under a written warranty, implied warranty, or service contract . . ." 15 U.S.C. § 2310(d)(1).

While the MMWA provides consumers with a cause of action in court to enforce their statutory rights, the Act also permits warrantors to require consumers to submit claims to "informal dispute settlement procedures" before commencing a civil action. 15 U.S.C. § 2310(a)(3). The Act states that warrantors may incorporate into their warranties the requirement that a consumer "resort to such procedure before pursuing any legal remedy," 15 U.S.C. § 2310(a)(3)(C), and that the consumer "may not commence a civil action . . . unless he initially resorts to such procedure . . ." 15 U.S.C. § 2310(a)(3). The MMWA thus treats informal dispute resolution procedures as a prerequisite, not an alternative, to adjudication through the public court system for claims arising from a written warranty. The Act also delegates authority to the FTC to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty" covered by the Act. 15 U.S.C. § 2310(a)(2).

2. The FTC's Long-Standing Interpretation of the Act

Pursuant to the MMWA's express delegation of authority, the FTC has issued regulations setting out the requirements for informal dispute settlement procedures used by warrantors. The FTC's regulations mandate that "[d]ecisions of the Mechanism shall not be legally binding on any person," 16 C.F.R. § 703.5(j), and that the warranty shall not state that the decision of any third party is final or binding in any dispute concerning the warranty. 16 C.F.R. § 700.8.

In 1975, shortly after the MMWA was enacted into law, the FTC clarified that the statutory and regulatory prohibitions against binding dispute settlement procedures applied to a warrantor's use of arbitration so that warrantors were prohibited from enforcing pre-dispute binding arbitration clauses against consumers. 40 Fed. Reg. 60168, 60,211. The FTC's interpretive regulation drew a distinction between pre-dispute and post-dispute uses of arbitration, finding that "nothing in the Rule . . . precludes the use of any other remedies by the parties *following* a Mechanism decision," but that "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act." *Id.*

In 1999, the FTC reaffirmed its position that the MMWA prohibits enforcement of pre-dispute binding arbitration clauses. The FTC noted that its earlier decision had been based on both the plain language of 15 U.S.C. § 2310 and on concerns for protecting consumers against waivers of their right of access to courts at the time of purchasing a product. 64 Fed. Reg. 19700, 19708. The FTC found that this earlier interpretation "continues to be correct," and therefore rejected requests from industry groups to amend 16 C.F.R. § 703.5(j) to permit binding arbitration clauses in written warranties. *Id.* at 19708-09.

B. The Proceedings Below

1. GM's Mandatory Binding Arbitration Program

General Motors ("GM") imposes an arbitration clause requiring consumers to submit their claims for breach of express warranty under the MMWA to binding arbitration. GM's Arbitration Program reserves for the company (but not for

its employee/consumers) the absolute right to "unilaterally modify, change, or withdraw the program at any time." The contractual "agreement" before this Court is one that gives a single party the power to design, change, and/or revoke its own dispute resolution procedures.

GM's standard practice has been to provide its arbitration clause to an employee/ consumer after she or he had selected a vehicle and taken delivery of it. Upon receiving the arbitration clause (and other papers related to the Arbitration Program), the employee/consumer was then told to either sign the agreement and waive her or his rights to bring a suit in court, or pay several thousand dollars more for the car. She or he could not return the car, however; it was already titled in their name and the car could no longer be sold as a new vehicle. This is the "choice" that Plaintiffs had when they obtained GM's written warranty and binding arbitration clause.

2. The Lower State Court Decisions

On August 10, 2000, the Michigan Circuit Court for the County of Oakland concluded that Plaintiffs' claims for breach of express warranty under MMWA may not be forced into binding arbitration. The trial court looked to the Act's plain language, its legislative history, and to the FTC's regulations in determining that the MMWA bars enforcement of GM's mandatory pre-dispute binding arbitration clause. App. 23-24.

The Michigan Court of Appeals reversed, noting that two U.S. Courts of Appeal have held that claims for breach of express warranty under the MMWA may be compelled into arbitration. *See Walton v. Rose Mobile Homes*, 298 F.3d 470

(5th Cir. 2002), and *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002). The Court of Appeals stated that "[w]here there is no conflict among the circuits of the federal court of appeals on a question of federal law, we are bound by the authoritative holdings of the federal circuit courts on federal questions." App. 14. The Court of Appeals reached this decision despite acknowledging that its conclusion was contrary to that of the Federal Trade Commission, and even though "there is a split of authority in the federal district courts and in the state courts that have addressed the issue." App. 15 n.5.

Court of Appeals Judge Murphy concurred in the court's opinion, but wrote separately to voice his disagreement with the federal circuit court rulings in *Walton* and *Davis* and to embrace Fifth Circuit Chief Judge King's dissent in *Walton*. App. 20 (quoting *Walton*, 298 F.3d at 492 (King, C.J. dissenting)). Judge Murphy also noted the split of authority among federal district courts and state courts, App. 19, and declared that, "[i]f I were not obligated to apply the majority opinion from *Walton* and the holding in *Davis*, I would conclude that the MMWA as reasonably interpreted by the FTC, precludes the application of binding arbitration agreements to claims arising under the MMWA for the reasons set forth by Chief Judge King in *Walton*." App. 20-21 (citation omitted).

3. The Michigan Supreme Court's Decision

The Michigan Supreme Court granted review and issued a memorandum opinion deciding the case without merits briefing or oral argument. The court held that the MMWA permits binding arbitration not because the federal circuit court opinions in *Walton* and *Davis* were binding on Michigan courts, but

because their reasoning was persuasive. App. 3-4. The court stated that *Walton* and *Davis* both examined the text, legislative history, and purposes of the MMWA and concluded that Congress did not intend to bar binding arbitration under this statute. App. 3. Based on this analysis, the court held that the plaintiffs' claims in this case are subject to binding arbitration.[1]

REASONS FOR GRANTING THE WRIT

There is a direct split of authority on the question presented. Federal and state courts have been divided both among and within themselves over whether the FTC's interpretation of the MMWA as prohibiting pre-dispute binding arbitration clauses for disputes arising from a written warranty is permissible. In contrast with the Michigan Supreme Court below, the Mississippi Supreme Court and a number of other courts have found that the FTC's interpretation of the Act *is* reasonable and should be accorded deference.[2]

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[1] Two Justices wrote separately to express disagreement with the decision to decide the case by memorandum opinion without merits briefing or oral argument. App. 4.

[2] *Compare Abela v. General Motors Corp.*, 677 N.W.2d 325, 327 (Mich. 2004) (App. 3-4); *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1272 (11th Cir. 2002); *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 475 (5th Cir. 2002); *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131, 1135 (Ala. 2000); *Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957 (Ill. 2004); *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 490 (Tex. 2001); *with Parkerson v. Smith*, 817 So. 2d 529, 533 (Miss. 2002); *Rickard v. Teynor's Homes, Inc.*, 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003); *Browne v. Kline Tyson's Imports, Inc.*, 190 F. Supp. 2d 827, 831 (E.D. Va. 2002); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F.

Furthermore, the Michigan Supreme Court erred in declining to follow the FTC's considered judgment in interpreting the MMWA. The MMWA authorizes the FTC to issue rules governing informal dispute resolution, and for nearly 30 years the Commission has consistently interpreted the Act to prohibit pre-dispute binding arbitration for disputes arising from a written warranty. The FTC's judgment is entirely reasonable, as the language of the MMWA explicitly provides that manufacturers may require consumers to submit disputes to informal dispute settlement mechanisms only as a pre-requisite, not a substitute, for the consumer's right to file a civil action in court. The MMWA's legislative history also reveals that, when the Act was adopted, Congress reasonably understood the phrase "informal dispute settlement mechanism" to encompass private arbitration mechanisms.

In light of the sharp split of federal and state court authority over the question presented and in light of the Michigan Supreme Court's erroneous determination below, this Court should grant review to resolve this issue and hold that the FTC permissibly interpreted the MMWA to prohibit enforcement of pre-dispute binding arbitration clauses.

I. REVIEW IS WARRANTED BECAUSE THERE IS A DIRECT SPLIT OF AUTHORITY OVER WHETHER THE MMWA PROHIBITS ENFORCEMENT OF PREDISPUTE BINDING ARBITRATION CLAUSES.

There is a direct split of authority between the Michigan

Supp. 2d 958, 964 (W.D. Va. 2000).

Supreme Court's ruling below (along with decisions of two federal circuit courts and three other state high courts) and decisions by the Mississippi Supreme Court and other federal courts over whether the MMWA and FTC regulations bar enforcement of pre-dispute binding arbitration clauses in consumer product warranties.

Courts addressing this question agree on a few basic propositions. First, they agree that § 2310(a)(3) of the MMWA allows warrantors to include in their warranties a requirement that consumers submit claims to an informal dispute settlement procedure as a prerequisite to initiating a civil action in court. *See, e.g., Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1272 (11th Cir. 2002); *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 475 (5th Cir. 2002); *id.* at 480-81 (King, C.J. dissenting). These courts also agree that the Act authorizes the FTC to make rules governing these out-of-court procedures, and that the FTC has declared both that all such procedures must be non-binding and that this requirement covers private arbitration procedures. *Davis*, 305 F.3d at 1277; *Walton*, 298 F.3d at 475; *Parkerson v. Smith*, 817 So. 2d 529, 533 (Miss. 2002). All courts thus recognize that the FTC construes the Act to bar enforcement of pre-dispute binding arbitration clauses.

But these courts sharply disagree over whether the FTC had authority to so interpret the MMWA and over whether this interpretation is reasonable so as to be accorded deference under *Chevron USA, Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). The courts that have deferred to the FTC have found that the Commission's interpretation is consistent with the Act's plain language and therefore is reasonable and entitled to deference under *Chevron*. *See, e.g., Parkerson*, 817

So. 2d at 533-34 (finding both that the MMWA's plain language evinces Congress's intent to preserve a consumer's access to court, and that FTC's interpretation is reasonable). By contrast, most federal circuit courts and state courts that have addressed this issue, including the Michigan Supreme Court below, rejected the FTC's interpretation and allowed enforcement of pre-dispute binding arbitration clauses. *See, e.g.*, App. 3-4 (and cases cited therein). Moreover, these courts that rejected the FTC's interpretation of the Act have done so using conflicting rationales. *Compare Walton*, 298 F.3d at 475 (rejecting FTC interpretation as contrary to Congress's intent in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, to make arbitration agreements generally enforceable); *with Davis*, 305 F.3d at 1278-79 (finding Congress's intent unclear, but holding that FTC's interpretation of MMWA is unreasonable in light of its text and legislative history). In light of the confusion this issue has generated among lower courts, this Court should grant review to resolve the question presented.

A. Substantial Authority Holds that the MMWA Prohibits Pre-Dispute Binding Arbitration Clauses.

The decision below is in direct conflict with the Mississippi Supreme Court's holding in *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002), that the MMWA bars enforcement of pre-dispute binding arbitration clauses for disputes arising from a written warranty. In *Parkerson*, the court found that "the plain language of the statute indicates that it intends to preserve the right of any consumer to bring a lawsuit for breach of written or implied warranties." *Id.* at 533. *Parkerson* also examined the MMWA's legislative history and concluded that "[t]his history reflects that it was Congress's

intent that any nonjudicial dispute resolution procedures would be nonbinding, and consumers would always retain the right of final access to court." *Id.* at 533-34 (quoting *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530, 1538 (M.D. Ala. 1997), *aff'd*, 127 F.3d 40 (11th Cir. 1997), *abrogated by Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002)). *Parkerson* concluded that the FTC's interpretation of the MMWA as prohibiting binding arbitration is reasonable and therefore entitled to deference under *Chevron*. *Id.* at 534.

Although *Parkerson* is the only state high court or federal circuit court opinion to hold that the MMWA prohibits predispute binding arbitration clauses, the disagreement and confusion among and within the lower federal and state courts is widespread. For example, numerous federal district courts continue to hold that the MMWA prohibits pre-dispute binding arbitration clauses for claims arising from a written warranty based on the Act's plain language addressing "informal dispute settlement procedures," and on the FTC's interpretation of this language. *See Rickard v. Teynor's Homes, Inc.*, 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003) ("[T]he FTC's expressed rationales for its interpretation of the MMWA indicate that the FTC's reading is based on a reasonable construction of the statute."); *Browne v. Kline Tyson's Imports, Inc.*, 190 F. Supp. 2d 827, 831 (E.D. Va. 2002) ("The FTC's regulations mirror the MMWA's statutory language to encourage dispute resolution, yet mandate that consumers have full and final access to the courts for resolution of their written warranty disputes."); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 964 (W.D. Va. 2000) ("The clear intent of Magnuson-Moss, as explicitly detailed in the attendant regulations, is to encourage alternative dispute settlement

mechanisms, but to not deprive any party of their right to have their warranty dispute adjudicated in a judicial forum.") Notably, *Rickard* discussed the federal circuit court opinions in *Walton* and *Davis*, but rejected both courts' analyses. *See* 279 F. Supp. 2d at 920-21. Given this growing split of authority among federal and state courts, this Court should step in to resolve the question presented in this case.

In addition to these courts holding that the MMWA prohibits binding arbitration for claims arising from a written warranty, there have also been several pointed dissenting opinions in the cases where appellate courts allowed binding arbitration under the Act. Perhaps most notably, Chief Judge King dissented from the Fifth Circuit's holding in *Walton* and issued a lengthy opinion in which she concluded that "[t]he case before us is, in essence, a classic *Chevron* case." *Walton*, 298 F.3d at 480 (King, C.J. dissenting). The *Walton* dissent noted that the MMWA's provisions addressing non-binding informal dispute settlement procedures contain neither a definition nor a clarification as to whether they were meant to address arbitration. *Id.* at 480-81.[3] After finding that the MMWA is unclear regarding any intention to limit the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, by prohibiting binding arbitration, the dissent rejected the Fifth Circuit majority's holding that the FAA itself is controlling on this question as "circular logic." *Id.* at 484; *see also Borowiec*, 808 N.E.2d at 972 (Kilbride, J. dissenting) (describing *Walton's* FAA holding

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[3] As the dissent noted, Congress's failure to mention arbitration or the FAA by name is hardly surprising since the FAA was widely held to be inapplicable to statutory claims at the time of the MMWA's enactment. *Id.* at 480 n.2.

as a "mistaken conclusion").

Instead, the *Walton* dissent found that the key statutory provision is the MMWA's express delegation of authority to the FTC to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty." *Walton*, 298 F.3d at 481 (quoting 15 U.S.C. § 2310(a)(2)). Based on this delegation and the Act's ambiguity about binding arbitration, the *Walton* dissent asked whether the FTC's interpretation of the Act is reasonable and thus entitled to deference under *Chevron*. Here, the *Walton* dissent departs from the Eleventh Circuit's holding in *Davis* by finding the FTC's interpretation reasonable because it was based on the Commission's independent examination of the MMWA's text and legislative history, and not (as *Davis* found) on presumptions drawn from now discarded case law barring all arbitration of statutory claims. *Id.* at 486-88; *see also Borowiec*, 808 N.E.2d at 985 (Rarick, J. dissenting) (finding that FTC's interpretation is entitled to "controlling weight" because it is not arbitrary, capricious, or contrary to the statute). The *Walton* and *Borowiec* dissents thus squarely rejected the result and rationales of both the Fifth Circuit majority's holding in *Walton* and the Eleventh Circuit's holding in *Davis*.

In light of these cases and opinions conflicting with the decision below and with rulings of numerous other federal and state courts, this Court should grant review to resolve the question presented in this petition.

B. There is Also Confusion Among the Courts Holding that the MMWA Allows Enforcement of Pre-Dispute Binding Arbitration Clauses.

In addition to the split of authority over whether the FTC's interpretation of the MMWA is permissible, courts that rejected the FTC's interpretation have done so based on conflicting rationales. Several courts holding that the MMWA does not bar enforcement of pre-dispute binding arbitration clauses purported to follow the Fifth Circuit's split-panel decision in *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002). In *Walton*, the Fifth Circuit found that "Congress has expressed a clear intention in favor of arbitration for contractual claims" in the FAA. *Id.* at 475. *Walton* examined whether, in light of the FAA, "Congress expressed any contrary intent" to regulate arbitration of claims under the MMWA. *Id.* *Walton* found that the MMWA does not evince Congress's intent to restrict binding arbitration because its text does not mention arbitration by name, its legislative history is inconclusive, and because there is no conflict between binding arbitration and the Act's underlying consumer protection goals. *Id.* at 475-78.

Walton further held that the FTC's interpretation of the MMWA as limiting uses of binding arbitration is directly contrary to Congress's clear statement in the FAA allowing arbitration, and therefore should not be given any deference under the first prong of *Chevron*:

> It is improper to use the FTC regulations themselves to determine congressional intent here. As noted previously, we must consider the statute's text, legislative history, and whether its purpose conflicts

> with another statute, to determine congressional intent. An agency's regulations, promulgated pursuant to a statute, are not part of this test.

Id. at 479; *but, see id.* at 480 (King, C.J. dissenting) (finding no clear indicia of Congress's intent, and that FTC's interpretation is reasonable). Having found that Congress spoke clearly to this issue in the FAA, the Fifth Circuit majority concluded that the FTC lacked authority to construe the MMWA as prohibiting pre-dispute binding arbitration clauses.

Shortly after *Walton* was decided, the Eleventh Circuit also rejected the FTC's interpretation of the MMWA as barring pre-dispute binding arbitration clauses, but did so on different grounds. In *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), the court similarly found that Congress did not express a clear intent to restrict uses of binding arbitration in the MMWA's text or legislative history and that there was no inherent conflict between binding arbitration and the Act's primary purposes. *Id.* at 1274-77. After finding that the MMWA is unclear about binding arbitration, however, *Davis* did not conclude as the Fifth Circuit did in *Walton* that the FTC's interpretation was impermissible due to a lack of authority to address the issue. *Id.* at 1278 n.6 (noting that *Walton* never reached question of whether FTC's interpretation was reasonable). Instead, *Davis* applied the second prong of *Chevron* and addressed whether the FTC's interpretation of the Act was reasonable. In deciding this issue, *Davis* examined the FTC's rationale for its interpretation, which was based largely on the Act's legislative history, and concluded that the interpretation was not reasonable because the MMWA's legislative history paralleled that of other statutes that this Court

has construed to allow arbitration. *Id.* at 1278-79; *see also In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 490 (Tex. 2001) (finding FTC's interpretation of MMWA's legislative history unreasonable). The Eleventh Circuit thus held that "the FTC's interpretation of the MMWA is unreasonable," *id.* at 1280, and that claims under the Act can be subject to binding arbitration.[4]

Despite the divergent analyses of the Fifth and Eleventh Circuits, the Michigan Supreme Court below and the Illinois Supreme Court have purported to follow *both* circuit court opinions in rejecting the FTC's interpretation and holding that the MMWA permits enforcement of pre-dispute binding arbitration clauses. *See* App. 3 ("We have examined the decisions in [*Walton*] and [*Davis*] and find their analyses and conclusions persuasive."); *Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957, 970 (Ill. 2004) (finding that "the federal circuit

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[4] *Davis*'s holding that the MMWA's provisions regulating "informal dispute settlement procedures" cannot reasonably be construed by the FTC to cover arbitration also conflicts with an earlier decision by the Eleventh Circuit itself that embraced this very interpretation of identical statutory language in a different section of the MMWA governing warranty disclosures. *See Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611, 622 (11th Cir. 2001) (discussing disclosure requirements of 15 U.S.C. § 2302(a)(7), and holding that warrantor cannot compel arbitration because it "failed to disclose in the warranty a term or clause requiring the Cunninghams to utilize an *informal dispute resolution mechanism*") (emphasis added); *see also Ex Parte Thicklin*, 824 So. 2d 723, 730 (Ala. 2002) (following *Cunningham*); *cf. Damlerchrysler Corp. v. Matthews*, 848 A.2d 577, 587 (Del. Ch. 2004) ("[T]here admittedly is some tension between *Cunningham*, on the one hand, and *Walton* and *Davis* on the other.")

courts of appeals are in agreement in their interpretation of this federal statute"). By failing to distinguish and choose between the two circuit courts' conflicting rationales for rejecting the FTC's interpretation, these opinions add to the confusion on this question of federal law by failing to set forth a coherent rationale. As one of the dissents in *Borowiec* explained:

> [T]he purported uniformity of the federal circuit courts of appeals relied on here by the majority is illusory. Regrettably, the majority opinion does not adopt a single rationale based on either of these cases, appearing instead to apply both. Without any explanation of the specific rationale used to decide this case, the majority's opinion fails to provide any guidance for future cases. I cannot countenance such an open-ended approach to setting precedent in this state.

Borowiec, 808 N.E.2d at 974 (Kilbride, J. dissenting). The divergence in reasoning among these courts rejecting the FTC's interpretation of the MMWA thus further demonstrates the need for this Court's review.

The confusion and disagreement both among and within federal and state courts over the question presented is perhaps best illustrated by the Alabama Supreme Court's rulings on this issue. In *Southern Energy Homes, Inc. v. Lee*, 732 So. 2d 994 (Ala. 1999), the court held by a 5-4 vote that the MMWA prohibits enforcement of pre-dispute binding arbitration clauses based on the Act's text and legislative history addressing informal dispute settlement procedures as non-binding and based on the FTC's interpretation of the Act. *Id.* at 999. Less

than 18 months later, however, the Alabama Supreme Court reversed course. In *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000), the court by another 5-4 vote issued a *per curiam* opinion adopting the dissenting opinion from *Lee* and held that the Act permits pre-dispute binding arbitration clauses. *Id.* at 1135 ("On the rationale of Justice See's dissent in *Lee*, we hereby hold that the Magnuson-Moss Act does not invalidate arbitration provisions in a written warranty.") The Alabama Supreme Court's history of reversal and divisions over this issue illustrate the need for this Court's review.

In light of the confusion that the question presented has generated among and within federal and state courts across the country, this Court should grant review to provide a definitive resolution of this important question of federal law.

C. Review is Warranted Because This Case Presents an Important and Recurring Issue of Federal Law.

Review also is warranted because the question presented in this case implicates the right of virtually every adult consumer in the country to have access to the civil justice system. The cases creating the split of authority discussed above involve some of the most critical economic transactions in the lives of most adult Americans. For example, many of these cases arose from purchases of manufactured homes that turned out to be defective. *See, e.g., Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 472 (5th Cir. 2002); *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1270 (11th Cir. 2002); *Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611, 613 (11th Cir. 2001); *Rickard v. Teynor's Homes, Inc.*, 279 F. Supp. 2d 910, 911-12 (N.D. Ohio 2003); *Pitchford v.*

Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958, 960 (W.D. Va. 2000); *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131, 1132 (Ala. 2000) (overruling *Southern Energy Homes, Inc. v. Lee*, 732 So. 2d 994 (Ala. 1999)); *Parkerson v. Smith*, 817 So. 2d 529, 531-32 (Miss. 2002); *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 482 (Tex. 2001). The issue is also arising in cases like this one involving the purchase of automobiles, *see, e.g.*, App. 1-2; *Browne v. Kline Tyson's Imports, Inc.*, 190 F. Supp. 2d 827, 828 (E.D. Va. 2002); *Damlerchrysler Corp. v. Matthews*, 848 A.2d 577, 578-79 (Del. Ch. 2004), or other products such as home computers. *See Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957, 959 (Ill. 2004). The question presented is thus a recurring one because it is continually arising out of the types of transactions to which most adult Americans are a party. Moreover, this question of federal law is important because its resolution will determine whether homeowners, automobile drivers, and other consumers can enter into these types of transactions while preserving their right of access to the public court system.

Federal and state courts are deeply divided over whether the Magnuson-Moss Warranty Act and agency regulations promulgated to further the Act's consumer protection goals can and do protect consumers who are entering into the most important of economic transactions against mandatory pre-dispute waivers of their right of access to public courts. This Court should grant review to provide a definitive resolution of this important and recurring question of federal law.

II. THE HOLDING BELOW IS CONTRARY TO THE LANGUAGE AND INTENT OF THE MMWA, AND TO THE INTERPRETATION OF THE AGENCY CHARGED WITH ADMINISTERING THE ACT.

The Court below erred in concluding that GM could insist that its employee-customers be subject to pre-dispute binding arbitration clauses covering claims for breach of a written warranty under the MMWA as a condition of purchasing a GM vehicle. The MMWA requires that all informal dispute settlement procedures established by warrantors be non-binding so that consumers retain the right to bring an action in court after they exhaust such procedures. In light of extensive legislative history establishing that Congress understood the phrase "informal dispute settlement mechanisms" to include private arbitration, and in light of Congress's broad grant of discretion to the FTC to implement the MMWA, the Court below departed from principles of law established by this Court by substituting its own judgment for that of the expert agency. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628, 105 S Ct 3346 (1985) (congressional intent to restrict or prohibit arbitration of statutory claims may be "deducible" from a statute's text, legislative history or underlying purposes).

A. The MMWA's Language and Intent Establish that Warrantors May Not Force Consumers to Submit Claims Under the Act to Binding "Informal Dispute Settlement Mechanisms."

The MMWA, enacted in 1974, sets out specific requirements for disclosures, duties, remedies, and procedures

relating to warranties on consumer products, creating an unqualified right of access to court for consumers who are injured by a breach of warranty. "[A] consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with an obligation under this title or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief." 15 U.S.C. § 2310(d)(1). While the MMWA allows warrantors to use informal dispute resolution procedures like arbitration, the Act makes these procedures a non-binding exhaustion requirement for claims arising from a written warranty, and not a substitute for litigation. *See* 15 U.S.C. § 2310(c)(3) (emphasis added). The MMWA thus only permits warrantors to establish informal dispute resolution procedures that are disclosed in their warranties, that preserve consumers' right of access to court, and whose decisions are deemed no more than relevant in judicial proceedings on the merits of a consumer's claim.

The legislative history of the MMWA confirms that Congress intended to ban the use of binding "informal dispute settlement mechanisms" in warranties. Congressman Moss, the named sponsor of the Act, explained to his colleagues in floor remarks that these provisions allow an opportunity for alternative dispute resolution, without limiting a warranty claimant's ultimate right to a judicial resolution:

> First, the bill provides the consumer with an economically feasible private right of action so that when a warrantor breaches his warranty or service contract obligations, the consumer can have effective redress. Reasonable attorney's fees and expenses are provided for the successful consumer litigant, and the

> bill is further refined so as to place a minimum extra burden on the courts by requiring as *a prerequisite to suit* that the purchaser give the [warrantor] reasonable opportunity to settle the dispute out of court, including the use of a fair and formal dispute settlement mechanism...

119 Cong. Rec. 972 (Jan. 12, 1973). The word "pre-requisite" here is key -- the dispute mechanism was intended to be something a consumer could be required to use *before* going to court, but not *instead* of going to court. The House report accompanying this legislation further states that "[a]n adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding." H.R. Rep. 93-1107, 93 Cong., 2d Sess. 41, *reprinted in* 1974 U.S.C.C.A.N. 7702, 7723. The MMWA's legislative history thus accords with the Act's plain language in making out-of-court proceedings a non-binding exhaustion prerequisite and not a complete substitution for the judicial resolution of express warranty claims.

B. The 1974 Congress Reasonably Understood the Phrase "Informal Dispute Settlement Mechanisms" to Include Pre-dispute Binding Arbitration.

As set forth above, a number of the courts that have held that claims under the MMWA may be compelled into arbitration have done so based upon the premise that "arbitration" is something very different than "informal dispute settlement mechanisms." The legislative history of the MMWA plainly demonstrates that arbitration was seen as one illustration of an informal dispute settlement mechanism.

In the Congress before the Congress which passed the MMWA, the predecessor bill to the MMWA became tied up in large part over a dispute over non-judicial proceedings. The resolution that Congress reached at that time was to authorize the National Institute for Consumer Justice to perform a study of informal dispute settlement mechanisms. Sen. Cook, the author of the floor amendment authorizing this study, said that the study should address "existing and potential voluntary settlement procedures, *including arbitration*." S. Rep. No. 92-269 at 63 (1971) (emph. added). Sen. Dole, similarly, said that this study was needed because Congress wanted more data on "private dispute settlement techniques, including arbitration in resolving consumer grievances." 117 Cong. Rec. 39626 (Nov. 5, 1971). For courts more than 30 years later to simply assume that arbitration could not be a type of informal dispute settlement mechanism is flatly at odds with the way these terms were used by the Congress that passed the MMWA.

In 1970, similarly, Miles W. Kirkpatrick, the Chairman of the FTC, equated an earlier draft of the MMWA's provision relating to "informal dispute settlement mechanisms" with "arbitration." Warranties and Guaranties: Hearings on H.R. 18056, H.R. 106090, H.R. 12656, H.R. 16782, H.R. 13390, H.R. 18758, H.R. 19293, and S. 3074, Before the Subcomm. On Commerce and Finance of the House Comm. On Interstate and Foreign Commerce, 91st Cong., 2d Sess. 64 (1970). Business advocates also linked these terms. *See* Eugene Keeney, Pres. American Retail Fed., Consumer Class Action: Hearings on S. 984, S. 1222, and S. 1378 before the Consumer Subcomm. of the Sen. Comm. on Commerce, 92nd Cong., 1st Sess. 163-66 (1971) (speaking of American Arbitration Association's "National Center for Dispute Settlement").

Consumer advocates also treated the terms the same way. *See* David Swankin, Consumers Union, Consumer Products Guaranty Act: Hearings on S. 3074 Before the Consumer Subcomm. of the Senate Comm. on Commerce, 91st Cong., 2d Sess. 259 (1970) (with respect to bill's provision relating to informal dispute settlement procedure, "we put so much importance in mandating a system of negotiation and arbitration").

The fact that the legislative history of the MMWA and its predecessor bills is replete with references to "arbitration" as one illustration of "informal dispute settlement mechanisms" is consistent with the way those terms were regularly used throughout the legal world at that time. Indeed, this very Court described the Railway Labor Act's procedures, including its arbitration mechanism, as "dispute settlement procedures." *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972). The leading treatise on arbitration at the time also described arbitration as a type of dispute settlement. *See* Martin Domke, The Law and Practice of Commercial Arbitration 5 (1968) ("nobody should be bound to resort to arbitration unless he has previously agreed to that method of *dispute settlement*.") (emph. added). Government officials used the same terminology. *E.g.*, Alfred Blumrosen, *Labor Arbitration, EEOC Conciliation and Discrimination in Employment*, 24 Arb. J. 88, 90 (1969) (arbitration listed as one "informal dispute settlement mechanism.") In subsequent years, state legislatures have also frequently conjoined these terms. *E.g.* N.J. Rev. Stat. § 56-12-30 ("Manufacturer's informal dispute settlement procedure' means an arbitration process or procedure by which the manufacturer attempts to resolve disputes. . . .").

The facts of this case further demonstrate that there can be no serious dispute that GM's arbitration clause is "informal," within the meaning of the MMWA's requirement in § 2310(a)(3) that warrantors' "informal dispute settlement procedure[s]" be non-binding. GM's arbitration program reserves for GM a unilateral right to "modify, change, or withdraw the program at any time." This is hardly a model of procedural formality from which to argue that the MMWA does not apply.

C. This Court Should Defer to the FTC's Authoritative Determination.

The Court below erred in substituting its own judgment for that of the FTC. As set forth above, the FTC determined that the MMWA prohibits the use of mandatory pre-dispute binding arbitration for claims under the statute in 1975, and then after extensive reconsideration re-affirmed this conclusion in 1999. The Court below erred in ignoring this longstanding and consistent interpretation of the expert agency charged with implementing the Act. The agency regulation should be given "controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

The FTC's interpretation of the phrase "informal dispute settlement mechanisms" in the MMWA is entitled to particularly deferential treatment for several reasons. First, the MMWA delegates broad direction to the FTC in a number of respects. The Act directs the FTC to determine the extent of the disclosures to be made under the MMWA, for example. 15

U.S.C. § 2302(a). The Act also requires that all informal dispute settlement mechanisms must comply with regulations to be promulgated by the FTC. *See* 15 U.S.C. § 2310(a)(2) ("The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this title applies"); 15 U.S.C. § 2310(a)(3)(A)-(C). This statutory authorization highlights the importance of deference here. *See United States v. Mead Corp.*, 533 U.S. 218, 121 S. Ct. 2164, 2172 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations for which deference is claimed."); *Smiley v. Citibank*, 517 U.S. 735, 739, 116 S Ct 1730 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering.")

Second, contemporaneous interpretations of administrative agencies deserve "peculiar weight" and deference. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (citation omitted). The FTC's 1975 interpretation of the Act is of particular importance, because the FTC was intimately involved in the debates that led to the passage of the Act. As noted above, the FTC Chairman was a lead witness in the hearings that led to the passage of the MMWA. Indeed, Congress noted that MMWA was a response to a "rising tide of complaints" received by the FTC, among others. H.R. Rep. No. 93-1107, at 22-28 (1974), reprinted in 1994 U.S.C.C.A.N. 7702, 7705-10.

Third, longstanding and consistent agency interpretations also deserve particular deference. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974). When the FTC re-considered the issue in 1999 and reached the same conclusion that it had reached in 1975, it displayed a consistency that is entitled to be given serious weight.

CONCLUSION

This petition for a writ of *certiorari* should be granted.

Respectfully submitted,

F. Paul Bland, Jr.
Counsel of Record
Michael J. Quirk
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Avenue, NW, Suite 800
Washington, D.C. 20036
(202) 797-8600

E. Powell Miller
Miller Shea, PLLC
1301 W. Long Lake, Suite 135
Troy, Michigan 48098
(248) 267-1200

Christopher M. Lovasz
Mark Romano
Consumer Legal Services, PLLC
30928 Ford Road
Garden City, Michigan 48135
(734) 261-4700

Dated: July 1, 2004

APPENDICES

Michigan Supreme Court
Lansing, Michigan 48909

FILED APRIL 7, 2004

JOHN and BARBARA ABELA,

Plaintiffs-Appellants,

v No. 124375

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

MEMORANDUM OPINION

This case poses the question whether the federal consumer product warranty act prohibits enforcement of a binding arbitration agreement entered into by a person who purchases a vehicle under a motor vehicle manufacturer's employee purchase plan. The trial court ruled that such a binding arbitration agreement is prohibited by the federal act. The Court of Appeals reversed the trial court's decision, relying on the supposedly binding authority of the decisions of two federal circuit courts of appeals. We affirm the decision of the Court of Appeals, but do so because we are persuaded by the reasoning employed in the federal decisions and not because we are bound by them.

Plaintiff John Abela purchased a 1999 Chevrolet truck from a General Motors dealership under defendant's employee purchase plan, which offered him a discount because of his wife's employment with General Motors. As part of the purchase contract, plaintiff was required to sign an agreement

requiring any warranty dispute to be settled by binding arbitration. The truck subsequently developed a number of problems, necessitating costly repairs. Plaintiff and his wife brought suit under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (MMWA), 15 USC 2301 *et seq.*, as well as two Michigan statutes.[1] Defendant responded with a motion for summary disposition pursuant to MCR 2.116(C)(7), claiming that plaintiffs had agreed to arbitrate any claims they had against defendant.

The trial court denied defendant's motion and granted summary disposition in favor of plaintiffs pursuant to MCR 2.116(C)(9), for failing to state a valid defense. The trial court based its ruling on the determination that defendant's program for binding arbitration was contrary to the MMWA and, therefore, unenforceable.

The Court of Appeals reversed the ruling of the trial court. 257 Mich App 513; 669 NW2d 271 (2003). It noted that two federal circuit courts of appeals had addressed the question whether the MMWA bars compulsory arbitration of written warranty claims, and that both had determined that the MMWA does not preclude such arbitration, otherwise enforceable under the Federal Arbitration Act (FAA), 9 USC 1 *et seq.* Citing *Schueler v Weintrob*, 360 Mich 621; 105 NW2d 42 (1960), and *Woodman v Miesel Sysco Food Co*, 254 Mich App 159; 657 NW2d 122 (2002), the Court of Appeals held that it is bound by the authoritative holdings of the federal courts of appeals on a federal question where there is no conflict among those federal courts on that question. Because the only two federal circuit

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[1] The two statutes are not relevant to this discussion. As the Court of Appeals correctly ruled in this case, the Michigan warranties on new motor vehicles act, the "lemon law," MCL 257.1401 *et seq.*, and the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, are surmounted by the federal arbitration act.

courts of appeals that had ruled on the issue concluded that binding arbitration agreements are not prohibited by the MMWA, the Court of Appeals found that the trial court had erred in granting plaintiffs' motion for summary disposition and in denying defendant's motion for summary disposition.

We disagree with the Court of Appeals basis for reversing the decision of the trial court. The Court of Appeals concluded that it was bound by the decisions of the federal circuit courts of appeals on questions of federal law. 257 Mich App 523. Although state courts are bound by the decisions of the United States Supreme Court construing federal law, *Chesapeake & O R Co v Martin*, 283 US 209, 220-221; 51 S Ct 453; 75 L Ed 983 (1931), there is no similar obligation with respect to decisions of the lower federal courts. *Winget v Grand Trunk W R Co*, 210 Mich 100, 117; 177 NW2d 273 (1920). See generally 21 CJS, Courts, 159, pp 195-197; 20 Am Jur 2d, Courts, § 171, pp 454-455. The Court of Appeals reliance on *Schueler v Weintrob*, 360 Mich 621; 105 NW2d 42 (1960), is misplaced. In that case, we were faced with conflicting decisions of lower federal courts and, of course, were "free to choose the view which seems most appropriate to us." 360 Mich 634. However, that statement does not establish the converse – that where there is no such conflict, we are bound to follow the decisions of even a single lower federal court. Although lower federal court decisions may be persuasive, they are not binding on state courts.

Although the federal courts of appeals decisions are not binding, we nevertheless affirm the decision of the Court of Appeals. We have examined the decisions in *Walton v Rose Mobile Homes LLC*, 298 F3d 470 (CA 5, 2002), and *Davis v Southern Energy Homes, Inc*, 305 F3d 1268 (CA 11, 2002), and find their analyses and conclusions persuasive. Both decisions carefully examined the MMWA and the FAA, and both concluded that the text, the legislative history, and the purpose

of the MMWA did not evidence a congressional intent under the FAA to bar agreements for binding arbitration of claims covered by the MMWA. Persuaded by these analyses of the federal courts of appeals, we conclude that plaintiffs' agreement with defendant to address the warranty claim through defendant's dispute resolution process, including mandatory arbitration, is enforceable.

The Court of Appeals result is affirmed on the basis of the above analysis, and this matter is remanded to the trial court for entry of an order for binding arbitration pursuant to the agreement.

Maura D. Corrigan
Elizabeth A. Weaver
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman

CAVANAUGH, J.

I would not dispose of this matter by memorandum opinion. I would grant leave to consider further briefing and argument.

Michael F. Cavanaugh
Marilyn Kelly

STATE OF MICHIGAN
COURT OF APPEALS

JOHN and BARBARA ABELA, Plaintiff-Appellees,	FOR PUBLICATION July 15, 2003 9:00 a.m.
v	No. 236238 Oakland Circuit Court
GENERAL MOTORS CORPORATION, Defendant-Appellant.	LC No. 99-018213-CK Updated Copy September 12, 2003

Before: Griffin, P.J., and Murphy and Jansen, JJ.

JANSEN, J.

Defendant appeals as of right from an order resolving all pending claims and closing the case in this action brought under the Magnuson-Moss Warranty Act (hereinafter MMWA), 15 USC 2301 *et seq.*; Michigan's warranties on new motor vehicles act (hereinafter lemon law), MCL 257.1401 *et seq.*; and Michigan's Consumer Protection Act (hereinafter MCPA), MCL 445.901 *et seq.*[1] Although the order appealed from is the final order in this case, defendant's arguments on appeal take issue with the trial court's denial of defendant's motion for summary disposition to compel arbitration, as well as the trial court's grant of summary disposition in favor of plaintiffs pursuant to

[1] We note that the Attorney General was an intervening plaintiff. However, the July 30, 2001, order appealed from dismisses the Attorney General as a party.

MCR 2.116(C)(9), for failing to state a valid defense.[2] We reverse and remand.

The lone issue in this case is whether the agreement between plaintiffs and defendant to submit any warranty claims to binding arbitration must be enforced. Plaintiffs argue that the MMWA and, alternately, the Michigan lemon law preclude a party from waiving the right to pursue legal action in a judicial forum. Plaintiffs assert that, under the MMWA and the Michigan lemon law, the agreement that the parties entered into, requiring binding arbitration of disputes, is unenforceable.[3] Defendant, on the other hand, maintains that the Federal Arbitration Act (FAA), 9 USC 1 *et seq.*, requires enforcement of otherwise valid agreements to arbitrate.

Plaintiffs purchased a 1999 Chevrolet truck from John Bowman Chevrolet, a dealership that sells automobiles that defendant manufactures. At the time of the purchase, defendant offered plaintiffs various warranties related to the automobile. In addition to those warranties, plaintiffs entered into

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[2] We note that the parties' pleadings intermittently refer to Barbara Abela as the lone plaintiff, as well as to Barbara and John Abela jointly as plaintiffs. In this opinion, Barbara Abela and John Abela will be referred to collectively as plaintiffs.

[3] On appeal, plaintiffs raise the issue that defendant's placement of the arbitration clause outside the warranty violates the MMWA "one document" rule. An appellate court need not address issues first raised on appeal. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003). We decline to address this issue, because there is no indication on this record that it was raised before the lower court. *Booth Newspapers, supra*; *Higgins Lake, supra*. Further, our refusal to address this unpreserved issue will not result in manifest injustice. *Herald Co, Inc v. Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998).

defendant's new vehicle purchase program. This purchase program was offered to, among other people, defendant's employees. On the agreement form, for this purchase, plaintiff John Abela is listed as the purchaser of the truck, and his spouse, plaintiff Barbara Abela, is the eligible employee. Although all the terms of this purchase program are not clearly set forth, defendant represents, and plaintiffs do not dispute, that a purchaser agreeing to participate in the purchase program could purchase a car for "either dealer cost or dealer cost + 2.5% of the MSRP [manufacturer's suggested retail price], depending on whether the participant purchased the car from dealer stock or directly from [defendant]."

The key provision of the purchase program agreement states:

> In addition, if I am the purchaser/lessee, I understand that, in consideration of the discount I receive on the purchase or lease of the vehicle, *I will not be able to bring lawsuit for any dispute involving repairs made to that vehicle under GM's Limited Warranty or regarding the extent to which such warranty coverage is provided on that vehicle. Instead, I AGREE to address such disputes through the GM Dispute Resolution Process, which includes mandatory arbitration that is binding on both GM and me.* I acknowledge that this Certificate evidences a transaction involving interstate commerce. The Federal Arbitration Act . . . shall govern the interpretation, enforcement, and proceedings of the arbitration. For matters the FAA does not cover, the laws of the State in which I reside shall govern. [Emphasis in original.]

Plaintiffs, apparently, encountered several problems with the truck that required numerous repairs by defendant and the dealership, and brought suit. Immediately following the filing of the complaint, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), alleging that plaintiffs had agreed to arbitrate any claims that they had against defendant.

Defendant's first issue on appeal is that the trial court erred as a matter of law in holding that plaintiffs can breach the agreement to arbitrate warranty-related disputes with defendant because the MMWA bars the application of the FAA. We agree.

The trial court granted summary disposition in favor of plaintiffs pursuant to MCR 2.116(C)(9), for failure to state a valid defense. Our Court set forth the applicable standard of review for a motion under MCR 2.116(C)(9) in *Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002), as follows:

> This Court reviews de novo the trial court's grant or denial of a motion for summary disposition. *Schulz v Northville Public Schools*, 247 Mich App 178, 182; 635 NW2d 508 (2001). When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim. *Village of Dimondale v. Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000) . . . Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery. *Alcona Co v Wolverine*

Environmental Production, Inc, 233 Mich App 238, 245-246; 590 NW2d 586 (1998). Statutory interpretation is a question of law also reviewed de novo on appeal. *Id.* at 246.

The trial court ruled that defendant's program for binding arbitration was contrary to federal law. The trial court noted that the MMWA and the federal regulations interpreting it permit a consumer to bring an action for damages and other relief in court. The trial court also noted that if the warrantor establishes an informal dispute settlement procedure that complies with the regulations, the consumer must use that mechanism, although the consumer is not bound by that decision. The trial court continued that the FAA was not instructive, because the MMWA was more specific in the area of arbitration in the area of warranties and was more recent. Accordingly, the trial court determined that the MMWA, and not the FAA, was controlling on this issue, and that the MMWA prohibited the use of binding arbitration for warranty claims.

Defendant asserts that the trial court erred as a matter of law in finding that the MMWA prohibited the use of binding arbitration for warranty claims. Specifically, defendant contends that the trial court's ruling is contrary to years of case law, both state and federal, that permit and uphold agreements for binding arbitration of disputes such as the warranty-related claims presented here.[4]

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[4] In fact, as defendant points out, the United States Supreme Court has approved application of the FAA to numerous statutes, including statutes with remedial purposes. For example, the Supreme Court has approved of agreements to arbitrate claims brought under the following statutes: the Age Discrimination in Employment Act, 29 USC 621 *et seq.*, in *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20; 111 S Ct 1647; 114 L Ed 2d 26 (1991); the Truth in Lending Act, 15 USC 1601 *et seq.*, in *Green Tree*

(continued...)

As a general rule, the MMWA provides that "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief . . . ." 15 USC 2310(d)(1). In keeping with its stated purpose that "Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms," 15 USC 2310(a)(1), the MMWA provides in 15 USC 2310(a)(3) that a warrantor may develop its own dispute settlement procedure. That provision in 15 USC 2310(a)(3) reads, in part:

> If –
>
> (A) a warrantor establishes such a procedure,
>
> (B) such procedure, and its implementation, meets the requirements of such rules, and
>
> (C) he incorporates in a written warranty a requirement that the consumer resort to such

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[4] (...continued)
Financial Corp v Randolph, 531 US 79; 121 S Ct. 513; 148 L Ed 2d 373 (2000); the Sherman Act, 15 USC 1 *et seq.*, in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614; 105 S Ct 3346; 87 L 3d 2d 444 (1985); and the Racketeer Influenced and Corrupt Organizations Act, 18 USC 1961 *et seq.*, in *Shearson/American Express Inc v McMahon*, 482 US 220, 242; 107 S Ct 2332; 96 L Ed 2d 185 (1987). In fact, as amicus curiae, Michigan Manufacturers Association, notes, the Supreme Court has upheld application of the FAA to every statutory claim that it has entertained. See, Comment, *Arbitrating Consumer Claims under the Magnuson-Moss Warranty Act*, 68 U Chi L Rev 1459, 1464 (2001).

> procedure before pursuing any legal remedy under this section respecting such warranty,
>
> then (I) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure . . . .

Thus, if a warrantor has an informal dispute settlement procedure in place, any warranty claim must be submitted for resolution under that procedure before a suit may be filed.

The Federal Trade Commission (FTC) was empowered to develop the minimum requirements for the informal dispute settlement mechanisms. 15 USC 2310(a)(2). By its very terms, the FTC guidelines specifically preclude a warrantor from implementing a procedure that is binding on the consumer, and that precludes bringing suit, 16 CFR 703.5(j) ("Decisions of the Mechanism shall not be legally binding on any person."). Moreover, a review of the FTC's response to public comments regarding the issue of binding arbitration indicates that the FTC was of the opinion that informal dispute settlement mechanisms, provided for in the MMWA, were intended to be nonbinding:

> "Several industry representatives contended that warrantors should be allowed to require consumers to resort to mechanisms whose decisions would be legally binding (e.g., binding arbitration). The Rule does not allow for this for two reasons. First, . . . Congressional intent was that Section 110 Mechanisms not be legally binding. Second, even if binding Mechanisms were contemplated by Section 110 of the Act, the Commission is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit

> themselves, at the time of product purchase, to resolve any difficulties in a binding, but nonjudicial, proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers against warrantors, even if the Congressional report had not made clear, as it did, that it wished for such mechanisms to not be binding." [40 Fed Reg 60168, 60210 (1975), quoted in *Wilson v Waverlee Homes, Inc*, 954 F Supp 1530, 1539 (MD Ala, 1997).]

Our Michigan Supreme Court has "repeatedly given great deference to the construction placed upon a statute by the agency legislatively chosen to enforce it." *Breuhan v Plymouth-Canton Community Schools*, 425 Mich 278, 282-283; 389 NW2d 85 (1986), citing *Magreta v Ambassador Steel Co*, 380 Mich 513, 519; 158 NW2d 473 (1968).

However, in *Walton v Rose Mobile Homes LLC*, 298 F3d 470, 478 (CA 5, 2002), the United States Court of Appeals for the Fifth Circuit held that the text, legislative history, and purpose of the MMWA does "not evince a congressional intent to bar arbitration of MMWA written warranty claims." Additionally, the *Walton* court held "that the MMWA does not preclude binding arbitration of claims pursuant to" the FAA. *Id.* at 479. Therefore, the *Walton* court found that a purchaser's MMWA claim was subject to compulsory arbitration, and that such purchasers were "bound to arbitrate their claims." *Id.*

In *Davis v Southern Energy Homes, Inc*, 305 F3d 1268, 1272 (CA 11, 2002), the United States Court of Appeals for the Eleventh Circuit held that the MMWA permits the enforcement of valid binding arbitration agreements within written warranties. The Eleventh Circuit concluded that the purposes of the MMWA and the FAA are very similar, stating:

> The last [*Shearson/American Express, Inc v*] *McMahon* [482 US 220; 107 S Ct 2332; 96 L Ed 2d 185 (1987)] factor requires us to examine the purposes of the MMWA to determine whether the MMWA and the FAA conflict. The MMWA expressly states three purposes: "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." These purposes are not in conflict with the FAA. In fact, the Supreme Court has repeatedly enforced arbitration of statutory claims where the underlying purpose of the statutes is to protect and inform consumers. . . .
>
> The MMWA's legislative history also indicates that Congress was concerned with addressing the unequal bargaining power between warrantors and consumers with the enactment of the MMWA, thus creating another possible purpose. Unequal bargaining power alone, however, is not a sufficient reason to never enforce an arbitration agreement of a statutory claim. [*Id.* at 1276-1277 (citations omitted).]

In *Davis*, *supra*, the Eleventh Circuit concluded that the text, history, and purpose of the MMWA did not show a congressional intent to preclude predispute agreements to submit warranty claims to binding arbitration. Moreover, the *Davis* court examined the FTC regulations discussed hereinbefore, and determined that those regulations, which were ostensibly based on the plain language of the MMWA, were unreasonable, as follows:

> In the legislative regulations, the FTC bases its construction on Congress' grant of concurrent jurisdiction. As we previously discussed, a statute's provision for a judicial forum does not preclude enforcement of a binding arbitration agreement under the FAA. Thus, the FTC's motive behind the legislative regulation is contradictory to Supreme Court rationale, and we conclude that its interpretation is unreasonable. We also conclude that the FTC's additional rationale is unreasonable. Although the FTC first stated that it looked to a subcommittee staff report (which appears to no longer be attainable) to determine Congress' intent, the FTC continued, evincing its major concern that an arbitral forum will not adequately protect the individual consumers. The Supreme Court in *McMahon*, however, rejected this same hostility shown by the SEC. Instead, the Supreme Court holds that arbitration is favorable to the individual. [*Id.* at 1280 (citations omitted).]

"'The interpretation of a federal statute is a question of federal law.'" *Ann Arbor Housing Comm v. Wells*, 240 Mich App 610, 614 n 4; 618 NW2d 43 (2000), quoting *Auto-Owners Ins Co v Corduroy Rubber Co* 177 Mich App 600, 604; 443 NW2d 416 (1989). Where there is no conflict among the circuits of the federal court of appeals on a question of federal law, we are bound by the authoritative holdings of the federal circuit courts on federal questions. See *Schueler v Weintrob*, 360 Mich 621; 105 NW2d 42 (1960); *Woodman v Miesel Sysco Food Co*, 254 Mich App 159, 165; 657 NW2d 122 (2002); *Ann Arbor House Comm*, *supra* at 614 n 4. Both the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals have ruled that binding arbitration agreements are not prohibited

by the MMWA, albeit with a different rationale. We are unaware of any conflict among the federal appellate courts with regard to this issue and, thus, are bound by the holdings of *Walton*, *supra*, and *Davis*, *supra*, to the extent they are consistent in permitting the enforcement of valid binding arbitration agreements within written warranties.[5] Consequently, we find that the trial court erred in granting plaintiffs' motion for summary disposition with regard to plaintiffs' MMWA claim and in denying defendant's motion for summary disposition with regard to this claim.[6]

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[5] Although there is no conflict in the federal appellate courts, we note that there is a split of authority in the federal district courts in the state courts that have addressed the issue. Several courts have found that the FTC regulation barring binding arbitration clauses in warranties is a reasonable interpretation of the MMWA even though the statute does not specifically mention arbitration. See *Browne v Kline Tysons Imports, Inc*, 190 F Supp 2d 827, 831 (ED Va, 2002) (finding that the MMWA precludes binding arbitration in accordance with the FTC interpretation); *Wilson v Waverlee Homes, Inc*, 954 F Supp 1530 (MD Ala, 1997) (finding that the MMWA precludes predispute agreements to submit disputes to binding arbitration); *Borowiec v. Gateway 2000, Inc*, 331 Ill App 3d 842, 849; 772 NE2d 256 (2002) (finding that the MMWA precludes predispute agreements to submit disputes to binding arbitration); *Parkerson v Smith*, 817 So 2d 529, 535 (Miss, 2002) (holding that the MMWA shows a clear intent to override the FAA and is a more recent and specific statute). But see *Stacy David, Inc v Consuegra*, 845 So 2d 303 (Fla App, 2003) (finding that MMWA claims are subject to predispute binding arbitration agreements); *In re American Homestar of Lancaster, Inc*, 50 SW3d 480 (Tex, 2001) (holding that the MMWA does not prohibit a consumer from agreeing to binding arbitration); *Results Oriented, Inc v Crawford*, 245 Ga App 432, 442; 538 SE2d 73 (2000) (holding that the MMWA does not prohibit a consumer from agreeing to binding arbitration); *Southern Energy Homes, Inc v Ard*, 772 So 2d 1131 (Ala, 2000) (holding that the MMWA does not invalidate an arbitration clause).

[6] In light of our determination with regard to the application of the MMWA to the FAA it is unnecessary for us to address defendant's second

(continued...)

Defendant's final issue on appeal is that the trial court erred as a matter of law in holding that plaintiff Barbara Abela's agreement to arbitrate warranty-related claims violates the Michigan lemon law. We agree.

We find that the FAA surmounts plaintiffs' lemon law claim. In *Decaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 498; 591 NW2d 364 (1998), this Court noted that "[s]tate courts are bound, under the Supremacy Clause, US Const, art VI, cl 2, to enforce the FAA's substantive provisions." The *DeCaminada* Court further indicated:

> This is a crucial distinction, because application of the FAA implicates the Supremacy Clause, which precludes us from applying our state constitution or laws to defeat federal legislation. US Const, art VI, cl 2. Thus, as the United States Supreme Court has held, where the FAA applies, it preempts any state law or policy that specifically invalidates arbitration agreements. *Doctor's Associates, Inc v Casarotto*, 517 US 681, 686-688; 116 S Ct 1652; 134 L Ed 2d 902 (1996). [*DeCaminada*, *supra* at 501-502.]

Here, there is no question that the FAA applies. Plaintiffs' only defense to its application is that the MMWA surmounts it, but as we determined, hereinbefore, the MMWA does not surmount the FAA in this regard.[7]

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[6] (...continued)
issue on appeal that its arbitration was not an informal dispute settlement procedure and, thus, not within the meaning of the MMWA.

[7] We note that such a reading essentially relegates MCL (continued...)

The case law is clear that the FAA surmounts any state law that invalidates agreements to submit claims to binding arbitration. Thus, the trial court erred in ruling that Michigan's lemon law precludes enforcement of predispute agreements to submit claims to binding arbitration. Plaintiffs' lemon law claim should have been resolved through binding arbitration. The trial court erred in ruling that Michigan's lemon law bans binding arbitration because the FAA surmounts applicable state law claims. Because the FAA surmounts any state law, to the extent that that law prohibits a binding arbitration agreement, the trial court erred in granting summary disposition in favor of plaintiffs on the basis that the lemon law forbids agreements to submit to binding arbitration. We reverse, on the basis that the lemon law claim should have been resolved in binding arbitration.

We reverse the trial court's grant of summary disposition on plaintiffs' MMWA and lemon law claims, and reverse the trial court's denial of defendant's motion for summary disposition on the MMWA and lemon law claims, because these claim should have been resolved through binding arbitration.

Reversed and remanded to the trial court with instructions to enter judgment in favor of defendant consistent with this opinion. We do not retain jurisdiction.

Griffin, P.J., concurred.

/s/ Kathleen Jansen

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[7] (...continued)
257.1407(1), which provides that "[a]ny rights and remedies provided a consumer under this act may not be waived," to a nullity. A reading of this provision suggests that a consumer may not waive the right to submit a claim to a judicial forum. However, according to *DeCaminada*, *supra*, the FAA, which surmounts any state law that invalidates arbitration agreements, permits such an agreement.

/s/ Richard Allen Griffin

STATE OF MICHIGAN
COURT OF APPEALS

JOHN and BARBARA ABELA, Plaintiff-Appellee,	FOR PUBLICATION July 15, 2003 9:00 a.m.
v	No. 236238 Oakland Circuit Court
GENERAL MOTORS CORPORATION, Defendant-Appellants.	LC No. 99-018213-CK Updated Copy September 12, 2003

Before: Griffin, P.J., and Murphy and Jansen, JJ.

MURPHY, J. *(concurring).*

I concur with the majority that we are required to conclude that warranty claims arising under the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq.*, may be subject to valid binding arbitration agreements in light of the holdings in *Davis v Southern Energy Homes, Inc*, 305 F3d 1268 (CA 11, 2002), and *Walton v Rose Mobile Homes LLC*, 298 F3d 470 (CA 5, 2002). We are bound by the authoritative holding of a federal appellate court concerning interpretation of a federal statute absent a conflict among the various federal appellate circuits. *Ann Arbor Housing Comm v. Wells*, 240 Mich App 610, 614 n 4; 618 NW2d 43 (2000). A review of federal appellate case law reveals no conflict with the holdings in *Davis* and *Walton*, *supra*, although there has been a split of authority in the federal district courts and in state courts as acknowledged by the majority.

I also concur with the majority that plaintiffs' claim under Michigan's lemon law, MCL 257.1401 *et seq.*, is precluded by the doctrine of preemption, which is predicated on the Supremacy Clause, US Const, art VI, cl 2, and which mandates state courts to enforce the substantive provisions of the Federal Arbitration Act (FAA, 9 USC 1 *et seq.*, regardless of state law to the contrary, unless the state law concerns the validity, revocability, and enforceability of contracts generally. *Doctor's Associates, Inc v Casarotto*, 517 US 681, 686-688; 116 S Ct 1652; 134 L Ed 2d 902 (1996); see also *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 498; 591 NW2d 364 (1998).

I write separately to merely voice my disagreement with the federal appellate court rulings on the interpretation of the MMWA and the FAA. I agree with the dissenting opinion of Chief Judge King in *Walton*, *supra* at 480. After a very reasoned analysis, Chief Judge King concluded:

> Accordingly, because I find that Congress has not "directly spoken to the precise question" whether binding arbitration clauses in written warranties governed by the MMWA are enforceable, and because the FTC's construction of the statute is eminently reasonable, I would defer to the Commission's expertise and affirm the district court's judgment refusing to compel arbitration of the Waltons' written warranty claims. [*Id.* at 492.]

If we were not obligated to apply the majority opinion from *Walton* and the holding in *Davis*, I would conclude that the MMWA, as reasonably interpreted by the FTC,[1] precludes the

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[1] Federal Trade Commission.

application of binding arbitration agreements to claims arising under the MMWA for the reasons set forth by Chief Judge King in *Walton*, *supra* at 480-492.

I concur.

/s/ William B. Murphy

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

Barbara Abela,

Plaintiff,

Case No. 99-018213-CK
Hon. David F. Breck

v

General Motors Corporation,

Defendant.
/

OPINION AND ORDER

At a session of said Court held in the City of Pontiac, County of Oakland, State of Michigan, on Aug 09, 2000

PRESENT: HON. DAVID F. BRECK
CIRCUIT COURT JUDGE

This action involves disputes regarding a motor vehicle warranty. Plaintiff purchased the vehicle through the General Motors New Vehicle Purchase Program, a discount program available to GM employees and family. The program required the purchaser including Plaintiff to assent to binding arbitration of disputes involving the warranty protections. A dispute regarding the warranty coverage arose and Plaintiff brought the present action which alleges:

Count 1: Violation of the New Motor Vehicle Warranties Act, MCL 257.1401, *et seq*;

Count 2: Violation of the Michigan Consumer Protection Act, MCL 445.9 *et seq*; and

Count 3: Violation of the Magnuson-Moss Warranty Act, 15 USC 2301, *et seq*, and 16 CFR 703 *et seq*.

Defendant moves for summary disposition of the action pursuant to MCR 2.116(C)(7) and (8), claim barred by agreement to arbitrate and failure to state a claim. Plaintiff also moves for summary disposition pursuant to MCR 2.116(C)(8) arguing the arbitration agreement is in violation of law and unenforceable. It appearing that Plaintiff cites the incorrect summary disposition rule, Plaintiff's motion will be considered pursuant to MCR 2.116(C)(9), failure to state a defense.

Defendant argues Plaintiff received a discount on the purchase price of a vehicle in return for her agreement to submit warranty disputes to arbitration. Defendant then cites the Federal Arbitration Act, 9 USC 1, *et seq* (FAA), to say arbitration agreements are favored and to be enforced by the courts. Plaintiff contends that the arbitration provision violates state and federal laws and is therefore unenforceable.

The Magnuson-Moss Warranty Act (MMWA) and related Federal Trade Commission (FTC) regulations permit a consumer who is damaged by a warrantor to bring a court action for damages and other relief. 15 USC 2310(d), *Wilson v Waverlee Homes*, 954 F Supp 1530 (MD Ala 1997), affirmed 127 F 3d 40 (CA 11 Ala 1997). If, however, the warrantor establishes an informal dispute settlement procedure that complies with certain requirements of the FTC, such dispute resolution mechanism must be used by the consumer.

The establishment and use of the informal dispute settlement procedure is conditioned on a requirement that it be non-binding. Where the mechanism is established by the warrantor, it complies with the necessary requirements, the warrantor incorporates the mechanism into the warranty and the mechanism is non-binding, the consumer is required to resort to the mechanism prior to the pursuit of any legal remedy. *Id.* It is therefore clear that arbitration of warranty disputes is permitted if it is non-binding and therefore the consumer retains access to the courts as a last resort. In other words, it serves as a condition precedent to court action and not a bar. *Id.* As non-binding arbitration is permitted upon the condition that the legal remedies remain available and binding arbitration bars other legal remedies, binding arbitration must necessarily be barred under the MMWA.

This is consistent with Congressman Moss' comments in the legislative history of the Act and the House Report. *Id.* Further, this conclusion is in accord with the Michigan State Attorney General's and Wayne County Circuit Court Judge Hathaway's opinions on this issue. Also, the FTC regulations state "decisions of the mechanism *shall* not be legally binding on any persons." 16 CFR 703.5(j). The FTC comments further state that binding arbitration was considered and rejected as contrary to the legislative intent. *Wilson*, *supra*.

Therefore, again, as the MMWA regulates arbitration of warranty disputes, requires legal remedies remain available and therefore binding arbitration must necessarily be barred under the MMWA, Defendant's provision for binding arbitration of warranty disputes must also be barred under the MMWA.

Defendant's reliance on the FAA is not helpful. It is agreed that Congress displayed a broad approval of arbitration agreements in the FAA. Many years later, Congress affirmed its approval of arbitration as a means of resolving disputes in the

MMWA. However, it determined that in the warranty context, with major corporations opposing consumers on warranty issues, the arbitration must be limited to non-binding arbitration with free access to the courts for consumers. The MMWA being more specific to arbitration in the warranty context than the FAA and being more recent by many years, this court finds the MMWA is controlling of the present issues. *HCSC-Laundry v United States*, 450 US 1 (1981).

Having found Defendant's program for binding arbitration to be contrary to federal law, this court also finds that it also violates Michigan law. The New Motor Vehicle Warranties Act, MCL 257.1401, *et seq*, Michigan's Lemon Law, provides that the rights and remedies under the Act may not be waived by the consumer. MCL 257.1407(1). However, GM's arbitration agreement violates this section in several respects including by requiring that the arbitration be binding, granting the arbitrator the authority to disregard the law and barring certain remedies, damages and attorney fees to a prevailing consumer. GM claims that it has since revised the program to eliminate any violations. However, this does not erase past violations and does not assure future compliance. Therefore, this claim is without merit. This Court finally concludes that there exists no just reason to delay entry of its order, and therefore:

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Disposition be, and the same hereby is, granted.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Disposition be, and the same hereby is, denied.

/s/ David F. Breck
HON. DAVID F. BRECK
CIRCUIT COURT JUDGE